No. _____

In The Supreme Court
Of The United States

October Term, 1976

David C. Hakim, PETITIONER

v.

Commissioner of Internal Revenue

PETITION FOR IMMEDIATE GRANTING OF
A WRIT OF CERTIORARI AND
MISCELLANEOUS MOTIONS TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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CITATIONS

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STATEMENT OF THE CASE AND
ISSUE PRESENTED

On August 20, 1976, this petitioner prior to judgment in the Court of Appeals filed before this Court a PETITION FOR IMMEDIATE GRANTING OF CERTIORARI AND MISCELLANEOUS MOTIONS, No. 76-270, which petition was denied on November 1, 1976. 50 L. Ed. 2d. 300.

On March 3, 1977, subsequent to the above named petition, the United States Court of Appeals for the Sixth Circuit dismissed this petitioner's appeal, calling it "frivolous and completely without merit".

Now is recapitulated and incorporated by reference each and every part of such prior petition to this Court to enjoin the operation of five tax preferences alleged by this petitioner to be arbitrary exercises of the taxing power and therefore unconstitutional under the Fifth Amendment Due Process Clause of the United States Constitution.

JURISDICTION

Jurisdiction is permitted under 28 U.S.C. 1254 and Rule 20. See Aaron v. Cooper, 358 U.S. 1, 13 (1958).

SUMMARY OF THE COMPLAINT[1]

1) The Investment Tax Credit (I.R.C. Section 46).

The above section sets forth a maximum 11% credit against the income tax for qualified investment in depreciable or amortizable property which is used as an integral part in a business. The tax credit generally may not exceed $25,000.00 plus 50% of the tax liability over that amount.

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1. It should be noted that if the alleged unconstitutional sections are held unconstitutional, ordinary income would result from the application of Sections 61(a) and 63; the basis of property inherited from a decedent would be its adjusted cost, from section 1012.

The dollar loss for the preferences other than section 1014 and 1023 is supported by "Table F-1, Tax Expenditure Estimates by Function", Special Analysis Budget of the United States Government, Fiscal Year 1976, 108-9; for section 1014 and 1023 is an estimate from material in Surrey, Stanley S., Pathways to Tax Reform, n. 53 to Ch. VI, p. 351.

2) Percentage Depletion
(I.R.C. Sections 611, 613 and 613A).

The above sections, 611 and 613 are the controlling sections (Section 613A is contingent upon their continuation) permitting percentage depletion (as opposed to cost depletion, which is section 612, and is similar to depreciation). Section 611 is the enabling section, whereas section 613 permits a flat percentage deduction of a maximum of 50% of the taxable income from the sale of property computed without the deduction for depletion. The property for which depletion is allowed is that property generally known as natural resources which are extracted from the earth.

Section 613A, enacted after the proceedings in the U. S. District Court, limits the percentage oil depletion allowance only to "independent producers and royalty owners" and to a maximum output of 1,600 barrels daily, (1400 in 1978). Depletion for gas producers is similarly limited.

3) The Domestic International Sales Corporations' (DISCs) "deferral" of income.
(I.R.C. Sections 991 and 995).

Section 991 is the enabling act to permit the preferential treatment accorded corporations which meet the qualifications of a DISC, which is a type of domestic corporation whose income is

predominately (95% or more) derived from export sales and rentals. Section 995 sets forth the deferral or effectively eliminates from taxation 50% of the income of a DISC, which deferred income is taxed to the shareholder, usually the parent corporation, only which is distributed, when a shareholder sells his stock, or when the corporation no longer qualifies as a DISC.

4) The Stepped-Up Basis of Property Acquired from a Decedent
(I.R.C. Sections 1014 and 1023).

The above section 1014 as supplemented by section 1023, added by the extremely complex Tax Reform Act of 1976, also enacted after the proceedings in District Court, steps up the basis of most property of a decedent passing away after December 31, 1976, to its fair market value on that date.

The above preference is especially discriminatory in that present appreciation of property remains untaxed by the income tax law, whereas the accumulation of wealth from ordinary income is subject to the income tax as the wealth is accumulated.

It is interesting to note that despite the unification of the estate and gift tax law under the Tax Reform Act of 1976, Congress allowed section 1015 of the Code to continue the taxation to the donee of the difference between the amount realized upon sale and the donor's adjusted basis.

5) The Capital Gains Exclusion (I.R.C. Sections 1201 and 1202).

The above sections set forth two alternative methods of taxation of the excess of the gain or the appreciation realized upon the sale or exchange of generally property held for investment purposes for a period longer than nine months (as amended by the Tax Reform Act of 1976, the mandatory holding period will increase to twelve months in 1978) less any loss realized on property held less than the mandatory holding period. Section 1201(a) provides a 30% rate of taxation on the net capital gains of corporations, and 1201(b) provides for individuals a rate of 25% on the net capital gain to $50,000.00 ($25,000.00 for married individuals filing separate returns). Section 1202 permits the exclusion of 50% of the net capital gain from gross income for individuals.

ARGUMENT

1) Standing to Sue.

Whenever this Court in civil rights cases has been faced with the problem of standing and the conscience of the Court compelled it to act, it invariably responded with the following:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. Marbury v. Madison, 5 U. S. 137, 163.

Certainly this case can be compared with Baker v. Carr, 369 U. S. 186, S.Ct. 691, 7 L. Ed. 2d 663 (1962), another case alleging discrimination (in the equality of a citizen's vote). Therein Mr. Justice Brennan stated that a person has standing if he has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" and a constitutional limitation upon legislative action.

Isn't justice to this petitioner as a taxpayer, obviously in combination with the will of the majority in our nation to control excesses of Congress, at least as important as the equality of his vote? But this petitioner need not end his argument on standing with the preceding, for this Court has stated in Flast v. Cohen, 392 U. S. 83 (1968) that a taxpayer "may or may not have the requisite personal stake in the outcome [of the issue he seeks to litigate], depending upon the circumstances of the case". 392 U. S., p. 101. And Justice Laskin of the Supreme Court of Canada, in Thornton v. Attorney General of Canada, 43 D.L.R. 3d 1 (1974), wherein was attacked the constitutionality of the Official Languages Act, R.S.C. 1970, c. O-2 of the Parliament of Canada,

states the following:

> ... [I]t would be strange and, indeed, alarming, if there was no way in which a question of an alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication. 43 D.L.R. 3d., p. 7.
>
> . . . . .
>
> The question of constitutionality of legislation has in this country always been a justicable question. Ibid., at 11.

Furthermore, after considering many tax decisions involving tax expenditures, such as Frothingham v. Mellon (1923) 262 U.S. 447, and its "considerable modification" by Flast v. Cohen, supra, Justice Laskin on page 18 of Thornton sets forth the following:

> Lord Mansfield ... looked upon the writ of mandamus as a public remedy which "was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." R. v. Barker (1762), 3 Burr. 1265 at p. 1267, 97 E.R. 823. The expansion of the declaratory action, now well established would to me be at odds

> with a consequent denial of its effectiveness if the law will recognize no one with standing to sue in relation to an issue which is justiciable and which strikes directly at constitutional authority.

2) The Problem.

On December 11, 1968, the Honorable Henry H. Fowler, Secretary of the Treasury, commented upon the inequities in the tax laws, wherein low income families are faced with for them is a heavy tax burden, whereas many individuals with income of $1 million or more pay the same effective rate of tax as do the latter[2]; that "our social and economic needs can better be served through direct measures outside the tax system, rather than by tax credits and other forms of incentives." Tax Reform Studies and Proposals, U. S. Treasury Department (Joint Publication, Committee on Ways and Means of the U. S. House of Representatives and Committee

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2. The inequity of the above is compounded by the fact that 244 people with adjusted gross incomes in excess of $200,000.00 didn't pay any federal income tax at all in 1974. "Extending Minimum Tax to More People With High Incomes Favored by Sen. Long," Wall Street Journal, Midwest Edition, Vol. LVI, No. 146, Wed., May 10, 1976, p. 2.

on Finance of the U. S. House of Representatives and Committee on Finance of the U. S. Senate, 91st Congress, First Session, published February 5, 1969) at 3-4, 7-8.

Furthermore, in 1975 it was acknowledged by the Honorable William E. Simon, Secretary of the Treasury, that increasingly burdensome taxes are "so high that the average worker has difficulty making ends meet," and that "our economy is suffering from a reduction in the purchases of homes and consumer durable goods... The principal buyers of (such goods) are the middle income classes".

Obviously there is a tremendous need for government revenue (the government cannot continue to forever print paper money to pay for its debts without our nation suffering the consequences). And with the need of further government revenue so great, and the middle class already so overburdened by taxes, it is obvious that such revenue must come from those most able to pay their fair share. "Welfare" for the wealthy, tax expenditures, preferences, or loopholes, must be eliminated; otherwise, the taxpayer revolt that is already sweeping the country could become so much worse that the income tax may lose viability as the fairest source of revenue for the government.

3) Common Features of the Alleged Unconstitutional Tax Preferences.

A. They do not and cannot benefit those outside the tax system who are acting in a manner consistent with the unrealized philosophical principles behind their enactment. Surrey, Stanley S., Pathways to Tax Reform (Mass.: Harvard University Press, 1974) at 134 (hereafter referred to as Surrey).

B. They are worth more to the high income taxpayer than to the low. Ibid.

C. They benefit taxpayers by paying them for doing what they would anyway! Because of this there is no adequate measure of achievement possible. Ibid.

D. They bring about unfair competition within industries by being a source of revenue to those whose livelihood is not directly dependent upon the success in terms of the profitability of the enterprise. Surrey, p. 138.

E. They acknowledge the risk in certain endeavors and discriminate in favor of them, disacknowledging that there is inherent risk in any human endeavor, even in the work of the common laborer.

F. They keep the tax rates high by constricting the tax base and thereby reducing revenues. Ibid., at 139.

G. They require the Internal Revenue Service to regulate programs that other agencies should. Ibid., at 144.

H. They conflict with other laws designed to maintain our democratic institutions, such as the Anti-trust laws.

I. They breed more inequities by giving powerful lobbyists a focus. The

will of the people is thereby further perverted by clandestine Congressional committee action. Stern, Phillip M., The Rape of the Taxpayer (New York: Random House, Inc., 1974) pp. 307-319 (Hereafter referred to as Stern).

4) Specific Effects of the Alleged Unconstitutional Tax Preferences.

A. The Investment Tax Credit. The investment tax credit hastens the replacement of men's jobs with machines, and with discriminatory treatment against used machinery and equipment (Code Section 48(c)), natural resources are more easily depleted.

B. Percentage Depletion. The above deduction discriminates against most other industries and even against industries in the same field (such as energy production) Tax Reform Studies and Proposals, U. S. Treasury Department, supra, at 426. An allowance or deduction can in effect be bought from a business to whom the allowance has absolutely no direct benefit. Stern at 247-248. There is risk in any enterprise (for example, inventions may become obsolete), and generally there is no write off of profits as there is in the favored enterprise. And furthermore, this tax preference discriminates against industries that recycle natural resources and encourages their depletion, thereby denying them from future generations.

C. The DISC Deferral of Income. The above preference initially enacted to grant similar benefits to domestically

based corporations as were provided to American foreign based corporations, actually discriminates against the latter corporations and also violates international trade agreements to which the United States is a party. "DISCs' Validity Is Challenged by GATT Panel," Wall Street Journal, Vol. LVII, No. 17, Fri., Nov. 5, 1976, p. 7. Only the larger corporations can afford the legal fees needed to create and continue DISCs. Stern, p. 273. Furthermore, the preference:

(1) Gives foreign nations tools and machines they cannot use. Schumacher, E. F., Small is Beautiful (New York: Harper & Row, 1973) at 57 (Hereafter referred to as Schumacher).

(2) Is not needed if the U. S. adopted sound economic policies. Ibid at 55-6.

(3) Encourages the rapid depletion of the national resources of other nations, which in exchange receive a technology which creates mass unemployment of their inhabitants. Schumacher at 7.

D. The Stepped-Up Basis of Property Acquired from a Decedent.

The estate tax should already be considered a preferential tax, permitted by Code section 102(a), for otherwise inherited property could be considered income to the recipient under Section 61. The estate tax is further loaded with so many preferences that it taxes large estates with expert estate planning at such a minimal rate that the estate tax provides only about 2% of federal revenues. Stern at 325, 327. And when Congress enacted Section 1023, it created a highly complex provision which presently permits the avoidance of taxation of the appreciation of property acquired from a deceased, when supposedly the estate tax and gift tax have been unified. Such preference furthermore causes grave economic distortions by creating a condition which promotes immobility of funds to avoid the payment of taxes. Stern at 113-4.

E. The Capital Gains Exclusion. It wasn't enough that Section 1001 (a) was enacted to avoid the annual reporting of the appreciation of property, equivalent to a deferral of taxes or an interest free loan. Congress further enacted the above preference or expenditure which

(1) Benefits only one taxpayer in ten. Stern at 95.

(2) Creates a meaningless distinction between qualified property. Stern at 102. (See also Section 1245).

(3) Is further supplemented by the deduction of interest on

loans to purchase qualified assets under section 163, accelerated depreciation under section 167, permissible treatment of the proceeds as capital gains even if received in installments, and the five year income averaging provision of section 1302.

Becuase of the above, preferential capital gains treatment has been called the "greatest cause of complexity as well as unfairness in our tax system". (Stern at 102).

5) Due Process, Equal Protection, and the Taxing Power.

From the days of the Pilgrims to the present, equal protection has been part of the historical principles of the American people. Liberty has been defined as the absence of arbitrary action wherein no class is to be preferred over another and the right of revolution recognized by at least the State of New Hampshire if class preference occurred. Article 10, Right of Revolution, in the New Hampshire Bill of Rights, 1784, (quoted in Great Quotations Compiled by George Seldes, (New York: Pocket Book Edition, 1972 at p. 448). Although the United States Constitution did not initially have a Bill of Rights, it was stated in 1788 by Delegate Parsons of Massachusetts that "No power is given to Congress to infringe on any one of the natural rights of the people." Bancroft, George, History of the Constitution of the United States (1884), 388.

The United States Supreme Court has recognized the principle of equality in Traux v. Corrigan, 257 U.S. 312, 331, and Bolling v. Sharpe, 347 U.S. 497, 499-500, as inherently contained within the 5th Amendment Due Process Clause: "No person shall be ... deprived of life, liberty, or property, without due process of law."

The income tax act of 1894 was held unconstitutional in part because it was held to be discriminatory against professional persons, tradesmen, and other employed persons. Pollack v. Farmers' Loan & Trust Co., 157 U.S. 429, 158 U.S. 601 at 637, and quoted in Brushaber v. Union Pac. R. R., 240 U. S. 1, 17, 36 S. Ct. 236, 60 L. Ed. 493 (1916). The Sixteenth Amendment provides that "Congress shall have the power to lay and collect taxes on income, from whatever sources derived" (emphasis added). The progressive rate structure was stated to be "more just and equal than a proportional one." Knowlton v. Moore, 178 U.S. 41, 109 (1900). And Mr. Chief Justice White in Brushaber, supra, recognized that there might develop

> a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, taking of same in violation of the Fifth Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as

> to inevitably lead to the same conclusion. 240 U.S. at 24-25.

Yet perhaps the closest case to this is Green v. Kennedy, 309 F. Supp. 1127, which enjoined the granting of exempt status under section 501(c)(3) to private schools maintaining racially discriminatory admissions policies and that contributions to such schools would no longer be tax deductible (The subsequent affirmation of Green v. Kennedy [Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971)] was affirmed mem. sub nom Coit v. Green, 404 U.S. 97 [1971])

CONCLUSION

> [T]he general expenses of government should be distributed among persons on the basis of ability to pay. [T]axes should be progressive--that is, high-income people should pay a larger fraction of their income in taxes than low-income people, because people with high-incomes give up luxuries to pay taxes while those with low-incomes give up necessities. [T]he poor should pay no taxes, since by definition they have less than enough money to buy the bare essentials and no way of contributing to the general costs of government. Accordingly, the ideal tax would be a progressive income tax from which the poor were exempt. Fried, et al, Setting National Priorities: The 1974 Budget (Washington: Brookings Institution, 1973), at 45-6.

Unfortunately, the above is not the present situation, for many of the very rich arrange their financial affairs so they pay little to nothing for what they receive from their nation, whereas many of the poor pay a tax rate of 25% or higher. Pechman, Joseph A., and Okner, Benajmin A., Who Bears the Tax Burden? (Washington: Brookings Institution, 1974) at 59.

Even though wealth is the product of labor, the earnings of the laborer are taxed more heavily than the property of the wealthy through the retention of the alleged unconstitutional tax preferences.

Some state that a "lack of incentive" would result if the wealthy are required to pay their fair share. Certainly this argument works both ways. However, since the average effective tax rate of the wealthy is presently only 26% (Stern at 12), the probable effective rate of 40% without the continuing legality of the preferences under attack should not be viewed as confiscatory, since obviously the wealthy benefit more from our social system than do the poor.

However, even James Madison in the earliest days of our Republic recognized that the self interests of the wealthy tend to trample upon the rules of justice with respect to the apportionment of taxes upon the various forms of property. James Madison, The Federalist, No. 10 quoted in Great Quotations, op. cit., p. 904.

Perhaps then, we have reached that moment in history referred to in the following quotation, also by

James Madison:

> We are free today substantially, but the day will come when our Republic will be an impossibility because wealth will be concentrated in the hands of the few. A Republic cannot stand upon bayonets, and when the day comes, when the wealth of the nation will be in the hands of a few, then we must rely upon the wisdom of the best elements in the country to readjust the laws of the nation to changed conditions. Quoted in the New York Post, as quoted by Great Quotations op. cit. 976.

Whether we survive as a nation may depend in large measure upon this Court recognizing that it is the element referred to in the above quotation. It should not shirk its responsibility, for "Never for a moment should [government] be left to irresponsible action." George Washington, as quoted in Great Quotations, op. cit., 455.

Therefore, this Court for reasons as set forth above and previously, should find that a substantial Constitutional issue exists by the plaintiff's allegation that Internal Revenue Code Sections 46, 611, 613, 613A, 991, 995, 1014, 1032, 1201 and 1202 are arbitrary exercises of the

taxing power and are unconstitutional under the 5th Amendment Due Process Clause and the Article I, Section 8, [1] General Welfare Limitation with their inherent equal protection limitation and the requested injunction should be issued or this cause should be remanded to the United States District Court for the convening of the requested Three Judge Court.

RESPECTFULLY SUBMITTED,

David C. Hakim

DAVID C. HAKIM, Plaintiff

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1975

No. 76-270

DAVID C. HAKIM,
Petitioner

v.

COMMISSIONER OF INTERNAL
REVENUE SERVICE,
Respondent

PETITION FOR IMMEDIATE
GRANTING OF CERTIORARI
AND MISCELLANEOUS MOTIONS

The petitioner requests certiorari before final judgment in this cause as permitted by 28 U.S.C. sections 1254(1), 2101(e) and sets forth the following in support of such request:

1) That this suit in equity for the convening of a Three Judge District Court under 28 U.S.C. 2282, 2284, to enjoin Internal Revenue Code provisions consisting of the investment tax credit, the percentage depletion deduction, the domestic international sales corporation's deferral of income, the stepped up basis (to its fair market value at the date of death or alternate valuation date) of property acquired from a decedent, and the capital gains exclusion of income, on the grounds that

such tax preferences[1] are arbitrary exercises of the taxing power and are, therefore, unconstitutional under the Fifth Amendment Due Process Clause and the Article I, Section 8 [1] General Welfare Limitation, was filed in early 1975 in the United States District Court for the Eastern District of Michigan, No. 5-70334. The alleged loss to the government and consequently to the people of the United States due to such preferences wherein the wealthy can avoid paying their fair share of taxes, consequently creating a condition of involuntary servitude upon this petitioner (plaintiff) and others similarly situated, was estimated to be twenty-six billion dollars ($26,000,000,000.00) yearly;[2]

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[1] The tax preferences that are alleged in the plaintiff's complaint and analyzed by his brief and reply brief for the Court of Appeals are briefly explained on pages 3 - 5 of the complaint and are summarized below:

Preference	Sections of the I.R.C. that Should Be Enjoined	Approximate Yearly Loss in Billions of Dollars
Investment of tax credit	46	4.2
Percentage depletion (of natural resources)	611, 613, 613A	2.5
DISC (Domestic International Sales Corporations deferral of income)	911, 995	1.1
Stepped up basis of property acquired from a decedent	1014	15.
Capital Gains exclusion	1201, 1202	3.1

[2] The irreparable injury allegations on pages 2 - 3 of his complaint were stated to be that this plaintiff, being a member of the middle class, is subject to the duty of paying more than his fair share of taxes because he does not benefit from such preferences; that his taxes would be approximately one thousand dollars less per year if the alleged discriminatory provisions were eliminated and the progressive rate structure adjusted accordingly to yield the same amount of revenue currently obtained. He also alleged that he believes such tax preferences to be a violation of the mores of his nation as embodied in his Federal Constitution (or to be a violation of public policy). Therefore, a further argument against the validity of the alleged unconstitutional tax preferences implicitly contained in the plaintiff's complaint is that they are per se discriminatory, that they inherently violate public policy whether or not the taxpayer benefiting from them is a member of the wealthy class.

2) That on October 21, 1975, United States District Judge Thomas P. Thornton denied this petitioner's motion for a Three Judge District Court and dismissed the action upon hearing of the defendant's motion to dismiss, stating in his order that this plaintiff did not allege a substantial constitutional issue;

3) That an amended notice of appeal to the United States Court of Appeals for the Sixth Circuit, No. 76-1009, was filed timely under 28 U.S.C. section 1291 on November 24, 1975, with the cause docketed shortly thereafter and with all required briefs filed before April, 1976;

4) That on or about June 1, 1976, this petitioner filed an amended motion for temporary and permanent injunctions and expedited hearing[3] by the Court of Appeals, which motion was denied on June 24, 1976;

5) That to this date the hearing on the merits of this cause by the Court of Appeals has not been scheduled.

Wherefore, assuming the truth of this plaintiff's allegation that the above named preferences are unconstitutional exercises of the taxing power, there is consequently a daily loss of approximately seventy million dollars ($70,000,000.00). Now then this petitioner (plaintiff) requests the United States Supreme Court to assume immediate jurisdiction because of the exceptional importance of this action, to determine that this plaintiff raised a substantial issue by his pleadings, and:

1) To issue a temporary injunction, and/or to grant and to expedite the hearing and afterwards to issue a permanent injunction to restrain the operation of the aforementioned tax preferences, or[4]

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[3] The earlier motion was a request for the Court of Appeals to hear this case en banc, which was denied on April 27. 1976.

[4] This plaintiff believes that the Supreme Court has jurisdiction to act as it desires in this cause under 28 U.S.C. 2106. (For example, it has discretion as to the effective date of any injunction.) However, if the Court wishes to remand this cause to the Court of

2) To remand this cause to the United States District Court for the Eastern District of Michigan for the immediate convening of a Three Judge District Court under 28 U.S.C. sections 2282, 2284, or to the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. section 1291 for the immediate convening of its usual Three Judge Court.

David C. Hakim

DAVID C. HAKIM,
Petitioner in pro se

Appeals or the United States District Court for the Eastern District of Michigan, it is requested that the Court issue the requested temporary injunction first.

No. 76-1009

UNITED STATES COURT OF
APPEALS FOR THE
SIXTH CIRCUIT

DAVID C. HAKIM,
Plaintiff-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE
Defendant-Appellee

ORDER

BEFORE: PHILLIPS, Chief Judge, PECK and LIVELY, Circuit Judges

Upon examination of the record and briefs, the Court concludes that this appeal is frivolous and completely without merit. The appeal is dismissed. Rule 9, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

Filed March 3, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID C. HAKIM,
Plaintiff,

v.

COMMISSIONER OF INTERNAL REVENUE,
Defendant.

CIVIL ACTION
5-70334

O R D E R

This cause having come on before the Court upon defendant's Motion to Dismiss, and the Court having read the filed briefs and hearing argument thereon, and being fully advised in the premises, the Court finds that the plaintiff does not have standing pursuant to the requirements established by Flast v. Cohen, 392 U.S. 83, (1968):

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff has not raised a substantial constitutional issue, and it is not necessary to convene a three-judge court:

IT IS FURTHER ORDERED that since plaintiff does not have standing the plaintiff's Complaint is dismissed with prejudice.

/s/ Thomas P. Thornton

THOMAS P. THORNTON
United States District Judge

ENTERED: OCT 21 1975

CERTIFICATE OF SERVICE OF PETITION FOR IMMEDIATE GRANTING OF A WRIT OF CERTIORARI AND MISCELLANEOUS MOTIONS TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

It is hereby certified that three copies of the Petition for Immediate Granting of a Writ of Certiorari and Miscellaneous Motions to the United States Court of Appeals for the Sixth Circuit, including an appendix, was served by mailing in the United States Mail, with postage prepaid, on May 5, 1977, to:

Solicitor General
Department of Justice
Washington, D. C. 20530

David C. Hakim
Petitioner in Pro Se

No. 76-1696

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID C. HAKIM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1696

DAVID C. HAKIM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brought this suit to enjoin the operation of several provisions of the Internal Revenue Code (26 U.S.C.) which he contends discriminate against lower and middle-income taxpayers by according preferential tax treatment to "wealthy individuals and corporations"[1] (Complaint, p. 2).

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[1]The provisions challenged by petitioner are: Section 46 (investment credit for specified types of business property), Sections 611 and 613 (depletion allowance for mines, oil and gas wells, other natural deposits and timber), Section 995 (tax treatment of qualifying "domestic international sales corporations"), Section 1014 ("stepped up" basis for determining gain or loss on the disposition of property acquired from a decedent) and Sections 1201 and 1202 (gains upon the sale or exchange of capital assets).

Since the filing of petitioner's complaint, Congress has added Section 1023 to the Code, which for the most part eliminates the "stepped-up" basis rules of Section 1014 about which petitioner complains. See Section 2005(a)(2), Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520.

The district court refused to convene a three-judge court under former 28 U.S.C. 2282 and dismissed the complaint for lack of standing and because the complaint failed, in any event, to raise a substantial constitutional claim warranting review by a three-judge court (Pet. App. 25).

Petitioner sought review in the court of appeals of the district court's dismissal of his suit. While the appeal was pending, petitioner filed a petition in this Court for certiorari before judgment by the court of appeals. This Court denied certiorari (429 U.S. 930). The court of appeals thereafter affirmed, concluding that petitioner's various arguments were "frivolous and completely without merit" (Pet. App. 24).

1. The courts below correctly held that petitioner lacked standing to bring this suit to enjoin the operation of several provisions of the Internal Revenue Code. As the Court observed in *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, "when a plaintiff's standing is brought into issue the relevant inquiry is whether * * * the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." Accord: *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 218.

Here, the "kind of direct injury required for standing" is missing because petitioner has no "personal stake in the outcome" of the issues he seeks to litigate that would differentiate him from other members of the public. *United States* v. *Richardson*, 418 U.S. 166, 172-173, 176-177; *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 38. Instead, petitioner seeks to challenge the constitutionality of the various Code sections referred to in his complaint solely in his capacity as an asserted "member of the middle class" (Pet. App. 2 n. 2), on the ground that the

challenged provisions give more affluent taxpayers preferential tax treatment to the alleged detriment of the middle class.

But there is no necessary connection between one taxpayer's present or potential tax liability and the tax treatment accorded others. As this Court held more than 50 years ago in *Massachusetts* v. *Mellon*, 262 U.S. 447, 486-489, and reaffirmed in *United States* v. *Richardson*, *supra*, 418 U.S. at 171-180, a plaintiff cannot use his status as a taxpayer as a basis for requiring a federal court to hear what are essentially his " 'generalized grievances about the conduct of government.' " *United States* v. *Richardson*, *supra*, 418 U.S. at 173, quoting from *Flast* v. *Cohen*, 392 U.S. 83, 106. Petitioner's interest in this lawsuit is "plainly undifferentiated and 'common to all members of the public' "— a circumstance which in itself strongly suggests that "the subject matter * * * [has been] committed to Congress, and ultimately to the political process." *United States* v. *Richardson*, *supra*, 418 U.S. at 176-177, 179.

2. The courts below also correctly held that petitioner failed to raise a "substantial" constitutional question that would have warranted convening a three-judge court under former 28 U.S.C. 2282. In petitioner's view, the progressive rate structure of the federal income tax is a doctrine of constitutional significance. Starting from this premise, petitioner argues (Pet. 19) that the various Code provisions challenged by him violate the General Welfare Clause of Article I, Section 8 of the Constitution as well as what he has termed (*ibid.*) the "inherent equal protection limitation" of the Due Process Clause of the Fifth Amendment. Thus, petitioner contends that wealthy individuals should be required, as a constitutional matter, to pay progressively greater taxes than others, and that any provision that may reduce their total tax liability is unconstitutional.

This Court, however, has always regarded the progressive tax-rate structure of the tax statutes as involving essentially a legislative rather than a constitutional matter. *Knowlton* v. *Moore*, 178 U.S. 41, 109; *Brushaber* v. *Union Pac. R. R.*, 240 U.S. 1. Moreover, it is also well settled that Congress possesses substantial latitude in making reasonable distinctions between differently situated taxpayers. *Brushaber* v. *Union Pac. R. R.*, *supra*, 240 U.S. at 24-25; *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 450-451; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583-585. "[L]egislative classification[s]" such as those involved in this case "will not be set aside if any state of facts rationally justifying • • • [them] is demonstrated to or perceived by the courts." *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6. In short, Congress does not violate due process or equal protection of the law when it exercises its legislative judgment to "tax different types of taxpayers differently."[2] See *Puget Sound Co.* v. *Seattle*, 291 U.S. 619, 624, 625; *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. at 585.

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[2]There is a sufficient justification for all of the provisions here in question. The investment credit (Section 46) was adopted not only with the hope of stimulating the "level of economic activity" of the country but also with the expectation that this would "in turn add to Federal Revenues" by enlarging the nation's tax base. H.R. Rep. No. 1447, 87th Cong., 2d Sess. 7 (1962). Indeed, contrary to petitioner's assertion that Section 46 discriminates in favor of the wealthy, Congress designed the investment credit with the idea that it would be "particularly important for new and smaller firms which do not have ready access to the capital markets." S. Rep. No. 1881, 87th Cong., 2d Sess. 11 (1962).

The percentage depletion allowance (Sections 611 and 613) serves both "to permit a recoupment of the owner's capital investment in the minerals" (*Commissioner* v. *Southwest Expl. Co.*, 350 U.S. 308, 312), and to "stimulate prospecting and exploration" for the natural resources necessary for maintaining the nation's economy. S. Rep. No. 617, 65th Cong., 3d Sess. 6, 8 (1918). Likewise, "domestic international sales corporations" are given special tax treatment under Sections 991 through 997 by providing "tax incentives for U.S. firms to increase their exports" and eliminating the disparity in tax treatment between United States companies engaging in export business through domestic corporations, and those engaging in such business through foreign subsidiaries. H.R. Rep. No. 92-533, 92d Cong., 1st Sess. 58 (1971).

Petitioner also objects to Section 1014, which generally provided that a taxpayer's basis in property acquired from a decedent is its fair market value at the date of a decedent's death (or alternate estate tax valuation date) rather than the cost of such property to the decedent. But as we have noted (p. 1, note 1), that provision has been substantially superseded by new Section 1023 which applies to decedents dying after December 31, 1976. At all events, the Court has recognized that "Congress unquestionably had power and reasonably might fix value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property • • •." *Brewster* v. *Gage*, 280 U.S. 327, 334.

Finally, petitioner complains that the capital gains provisions of the Code (Sections 1201 and 1202) are discriminatory. But the preference for capital gains ameliorates the hardship of imposing a one-time tax on the entire gain realized by taxpayer when, in all probability, any "appreciation in value accrued over a substantial period of time." *Commissioner* v. *Gillette Motor Co.*, 364 U.S. 130, 134; *Commissioner* v. *Brown*, 380 U.S. 563, 572. See also H.R. Rep. No. 350, 67th Cong., 1st Sess. 10-11 (1921).

Finally, the General Welfare Clause was intended to expand and not limit Congress' power of taxation. *United States* v. *Butler*, 297 U.S. 1, 65-66. Thus, "whether a tax serves • • • [the general welfare] • • • is a practical question addressed to the law-making department"—not the courts. *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 313. See also *Helvering* v. *Davis*, 301 U.S. 619, 640-641.

In light of the above principles, petitioner failed to raise any "substantial" constitutional question. The district court therefore properly dismissed his complaint without convening a statutory three-judge court. See *Ex parte Poresky*, 290 U.S. 30, 31-32; *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715; *Swift & Co.* v. *Wickham*, 382 U.S. 111, 115.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JULY 1977.

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*The Solicitor General is disqualified in this case.

No. 76-1696

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

David C. Hakim, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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COMMISSIONER OF INTERNAL REVENUE

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INTRODUCTION

This is a proceeding to convene a Three Judge District Court under 28 U.S.C. sections 46 (the investment tax credit), 611 and 613 (percentage depletion of natural resources), 995 (the Domestic International Sales Corporations (DISC) "deferral" of income), 1014[1] (the stepped up basis of property acquired from a decedent) and 1201 and

[1]It should be noted that because of the basis boost by I.R.C. Section 1023 of most property held by a decedent to its value on December 31, 1976, many years must pass and a minimum estimated 75 billion dollars in taxes lost until the

edent), and 1201 and 1202 (The capital gains exclusion) on the grounds that such legislation are arbitrary exercises of the taxing power shifting the burden of paying taxes upon lower and middle income taxpayers.[2] All relevant dates and prior disposition of this cause are contained within the appendix to the petition and the petition itself.

STANDING TO SUE

A) The Petitioner as a Proper Party.

In rebuttal this petitioner recapitulates his prior statement on standing as contained within his petition and replies to the respondent's arguments as follows:

(a) The injured parties in Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, would not have been assured that hospitals would have admitted them even if the Court had declared that I.R.C. Section 501 (c) (3) exempt status would no longer be permitted. The conduct of the hospitals per se was not before the Court since the hospitals were not parties to the action.

(b) Schlesinger v. Reservists to Stop the War, 418 U.S. 208 and U.S. v. Richard-

latter section will effectively eliminate a substantial part of the inequity brought about by pre-1977 Section 1014, but with the necessity of understanding and using an extremely complex (though one of many) Code section.

[2]This petitioner believes he has adequately addressed himself to an analysis of any economic bene-

son, 418 U.S. 166, were actions wherin reservist membership of members of Congress was questioned under Article 1, Section 6, Clause 2 of the U.S. Constitution and C.I.A. under Article 1, Section 9, Clause 7 respectively, with no direct injury to the complainants proven. (c) Massachusetts v. Mellon, 262 U.S. 447, questioned expenditures for maternity and child care.

B) The Allegation of a Substantial Federal Question.

(a) Brushaber v. Union Pac R.R., 240 U.S. 1,[3] and Steward Machine Co. v. Davis, 301 U.S. 548, support the argument of this petitioner that the Court has authority to strike down tax legislation found to be arbitrary:

> (W)e assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment. Steward Machine Co. v. Davis, 301 U.S. 548, 585, 57 S. Ct. 883, 890.

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fit of the alleged unconstitutional tax preferences in his petition. More concerning their economic disruption will be stated within this reply.

[3]This petitioner quotes the relevant quotation from Brushaber on pages 15-16 of his petition.

(b) This petitioner personally knows of businesses that cannot benefit from the investment tax credit because they cannot afford the needed investment or don't have the credit as do larger businesses. They would benefit more from the government funding the Small Business Administration with the abolition of the credit which only serves to make the competitive advantage of the larger businesses even greater.
(c) Brewster v. Gage, 280 U.S. 327, did not question the constitutionality of Section 1014 (the stepped up basis of property acquired from a decedent [4]). And neither Commissioner v. Gillette Motor Co., 364 U.S. 130, nor Commissioner v. Brown, 380 U.S. 563, questioned the constitutionality of Sections 1201 and 1202 (the capital gains provisions) of the Code.

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[4]The Joint Committee on Taxation of the Congress of the United States on December 29, 1976, stated the following about pre-1977 Section 1014 (which is equally applicable to its literal retention for this generation by Section 1023):

> Prior law resulted in an unwarranted discrimination against those persons who sell their property prior to death as compared with those whose property was not sold until after death. Where a person sells appreciated property before death, the resulting gain is subject to the income tax. However, if the sale of the property

(Footnote 4, continued)

could be postponed until after the owner's death, all of the appreciation occurring before death would not be subject to the income tax.

This discrimination against sales occurring before death created a substantial "lock in" effect. Persons in their later years who might otherwise sell property were effectively prevented from doing so because they realized that the appreciation in that asset be taxed as income if they sold before death, but would not be subject to income tax if they held the asset until their death. The effect of this "lock in" was often to distort the allocation of capital between competing sources. Joint Committee Explanation, 94th Congress, 2nd Session, published in 1976-3 C.B., Vol. 2, at 564 (p. 552 of the Joint Committee Explanation).

But what the Committee avoided stating was the actual motive, that of someday reducing the discrimination against those who deposit their fully taxed earnings in the bank, paying taxes on interest, and their estate still paying estate taxes when they pass away.

CONCLUSION

That this cause seeks to have enjoined clear acts of tyranny of the Congress of the United States should be apparent from the following:

(a) The Honorable Henry H. Fowler, Secretary of the Treasury, presented the following to Congress on December 11, 1968:

> Examples of effective nontax methods of achieving objectives that have been sought through the tax system include guaranteed loans, equal opportunity grants, and other programs to assist students and their families with costs of higher education; direct grants for water pollution control projects; rent supplements and interest subsidies to increase the supply of low and middle income housing; and government contracts with private employers to train hard core unemployed for jobs. These methods achieve the important objectives in a manner consistent both with an equitable tax system and with careful

and responsible budgetary control by the executive and the Congress. (Emphasis added). Tax Reform Studies and Proposals, U.S. Treasury Department (Joint publication, Committee on Ways and Means of the U.S. House of Representatives and Committee on Finance of the U.S. Senate, 91st Congress, First Session, published February 1, 1969) at 7-8.

(b) Article 10, Right of Revolution:

> Government being instituted for the common benefit, protection, and security of the community and not for the interest or emoluments of any one man, family, or class of men; therefore, whenever the ends of government are perverted and public liberty manifestly endangered and all other means of redress ineffectual, the people may, and of right ought to reform the old or establish a new government. The doctrine of nonresistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.

New Hampshire Bill of Rights 1784, as quoted in Great Quotations, compiled by George Seldes (N.Y.: Pocket Book Edition, Nov. 1972), 448.

(c) At the June 30 meeting of the Board of Directors of the Grosse Pointe Inter-Faith Center for Racial Justice, the Board voted unanimously to strongly endorse the suit you (the petitioner) are bringing before the United States Supreme Court, #76-1696.

Although the Inter-Faith Center will not be entering an amicus brief in the case, we wish to go on record in strong support of your case against the unfair income tax structure in the United States and applaud your efforts in doing so on behalf of all lower and middle income people.... Letter dated August 3, 1977, from the G.P.I.F.C.R.J., 15222 E. Jefferson, Grosse Pointe Park, Michigan, 48230, (313) 824-0350, signed Gail Wingard, Executive Director.

Therefore, this petitioner again requests certiorari for this cause

and
(a) remand to the United States District Court for the Eastern District of Michigan, Southern Division, or preferably
(b) the settlement of this cause by the Court itself.

Respectfully submitted,

David C. Hakim
David C. Hakim,
Petitioner

No. 76-1696

David C. Hakim, Petitioner

Commissioner of Internal Revenue

October Term, 1977

CERTIFICATE OF SERVICE OF THE REPLY TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

It is hereby certified that three copies of the Reply to the Memorandum in Opposition was served by mailing postage prepaid on September 20, 1977 to;

Daniel M. Friedman
Acting Solicitor General
Department of Justice
Washington, D.C. 20530

David C. Hakim
David C. Hakim,
Petitioner
in Pro Se